DEPARTMENT OF JUSTICE
Antitrust Division

CHARLES A. JAMES
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (f)
antitrust@justice.usdoj.gov (internet)
http://www.usdoj.gov (World Wide Web)

September 23, 2002

Jerry B. Edmonds, Esquire
Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, Washington 98101-2380

Dear Mr. Edmonds:

This letter responds to your request, on behalf of the Washington State Medical Association ("WSMA"), for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. §50.6. You have requested a statement of the Antitrust Division's current enforcement intentions with respect to a proposal under which the WSMA would conduct a fee and reimbursement survey of physicians and publish the survey results (the "Survey"). Our understanding of the facts is based solely on the representations made in your request and the information you provided in support of it. Should the facts turn out to have been inaccurate, or should the facts change, our conclusion may also change.

The WSMA will utilize the Survey to collect and then publish two categories of statistics: (1) the average amount charged for particular services by Washington physicians, and (2) the average reimbursement particular insurers provide Washington physicians for such services, aggregated by "Health Insurer" named by the Survey respondents.

In this letter, we analyze separately the portions of the Survey relating to each category of statistics. We conclude that the first portion of the Survey (Average Charge for Each Service) falls within the Antitrust Safety Zone ("Safety Zone") found in Statement 6 of the Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care ("DOJ/FTC Health Care Guidelines"). The second portion of the Survey (Average Reimbursement for Each Service, Aggregated by Health Insurer Named by Survey Respondents), which does not fit within the Safety Zone, raises the possibility of anticompetitive effects. Your representations suggest, however, that there are procompetitive justifications for this portion of the Survey and further that there are facts that should allay our concerns about its potential anticompetitive effects. Based on those representations, we have no current intention

of challenging the second portion of the Survey. In sum, then, the Department has no current intention of challenging the Survey based on the information that we have at this time.

1. Background

The WSMA is a Washington statewide professional association in which membership is voluntary and is limited to physicians and physician assistants. The WSMA represents that approximately 75 percent of physicians in Washington are WSMA members. Pursuant to a resolution passed by the WSMA House of Delegates, the WSMA proposes to collect fee and reimbursement information from physicians and physician assistants with statistical results made available to WSMA members. Participation in the Survey would be voluntary, and the Survey may be repeated on an annual basis. The WSMA expects that the results of the Survey will ultimately become widely available as there is no expectation of secrecy or confidentiality of the published information in the hands of WSMA members. The WSMA plans, to the extent possible, to structure the Survey to conform with the criteria of the Safety Zone found in Statement 6 of the DOJ/FTC Health Care Guidelines.

The WSMA intends to compile the following statistics from the data gathered via the Survey: (1) average charge for each service, and (2) average reimbursement for each service, aggregated by "Health Insurer" named by the Survey respondents. In addition, the WSMA may choose to present those statistics by "Health Insurer" by geographic regions within Washington State, if variations appear across regions in the reimbursement data reported via the Survey. In all circumstances, however, provider-specific information will not be disseminated, as provider data will be aggregated in the manner set forth in Statement 6 of the DOJ/FTC Health Care Guidelines. The Survey will utilize medical service codes and service descriptions found in the American Medical Association publication entitled "Current Procedural Terminology" ("CPT"). In our analysis of the WSMA proposal below, we address each category of statistics separately.

2. Average Charge for Each Service

Statement 6 of the DOJ/FTC Health Care Guidelines sets forth a Safety Zone that describes exchanges of price and cost information among providers that will not be challenged by the Department of Justice or the Federal Trade Commission under the antitrust laws, absent extraordinary circumstances. The Safety Zone of Statement 6 applies to provider participation in written surveys of prices for health care services if the following conditions are satisfied:

(1) the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);

(2) the information provided by survey participants is based on data more than 3 months old; and

(3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it

would not allow recipients to identify the prices charged or compensation paid by any particular provider.

A survey of provider charges by CPT codes resulting in statistics showing an average charge for each such CPT code will fall, absent extraordinary circumstances, within the above Safety Zone if the three conditions are satisfied. In this instance, the WSMA has indicated its intention to comply with all three conditions. The Survey will be managed by a third-party trade association, the WSMA, specifically by the WSMA professional staff (or by an outside company retained by the WSMA) and not by WSMA members. All data submitted by providers to the WSMA will be more than three months old.[1] Finally, any published data will be aggregated in the manner set forth above in the Safety Zone. Therefore, based upon the information and assurances that you have provided to us, this portion of WSMA's proposed Survey fits within the Safety Zone of Statement 6.

3. Average Reimbursement for Each Service, Aggregated by "Health Insurer" Named by the Survey Respondents

A survey that provides health insurer-specific reimbursement information involves information beyond that contemplated by the Safety Zone of Statement 6. The Safety Zone of Statement 6 applies to the prices at which providers, such as physicians, offer their services to purchasers, such as insurers. Consequently, the Safety Zone sets forth factors (such as sufficient aggregation of provider data) that collectively create a high degree of confidence that dissemination of provider pricing information would not raise substantial competitive concerns. The second portion of the Survey, however, involves the dissemination of information (collected from providers) on insurer reimbursement, rather than provider prices. The Safety Zone, limited to provider pricing information, does not by its terms apply to the dissemination of insurer reimbursement information. Applying, by analogy, the framework of the Safety Zone, one might look for, among other factors, sufficient aggregation of both provider information (as providers are submitting the information) and insurer information (as insurer reimbursement is the subject of this portion of the Survey). Here, while the provider information will be aggregated, the insurer information will not, and, thus, even by analogy, the Safety Zone would not apply.

Falling outside of the Safety Zone does not mean, however, that the conduct is illegal. The safety zones found in the DOJ/FTC Health Care Guidelines are designed to require consideration of only a few factors that are relatively easy to apply, and to provide the

[1] The WSMA raises the alternative possibility of collecting current information, but not disseminating any statistics compiled from this information until the information is more than three months old. While this approach would take this portion of the Survey outside of the Safety Zone, we believe that it achieves the same end as the Safety Zone's requirement. We note, however, that the collection of current information would make it particularly important that the raw data be properly safeguarded against unauthorized access, use, or dissemination, which are important considerations under any circumstances.

Department of Justice and the Federal Trade Commission with a high degree of confidence that arrangements falling within them are unlikely to raise substantial competitive concerns. Thus, the safety zones encompass only a subset of provider arrangements that the agencies are unlikely to challenge under the antitrust laws. The statements found in the DOJ/FTC Health Care Guidelines outline the analysis the agencies will use to review conduct that falls outside of the safety zones.

Statement 6 indicates that "[e]xchanges of price and cost information that fall outside of the antitrust safety zone generally will be evaluated to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange." Of course, it is worth noting that while a rule of reason analysis applies to the information exchange itself, it does not necessarily apply to all agreements that may result from the information exchange. As Statement 6 indicates, "[i]f an exchange among competing providers of price or cost information results in an agreement among competitors as to the prices for health care services or the wages to be paid to health care employees, that agreement will be considered unlawful per se."

Under a rule of reason analysis, the second portion of the WSMA's proposed Survey raises the possibility of anticompetitive effects in the sale of physician services. One concern is that the publication of average reimbursement amounts paid by individual insurers could lead to collusive activities for the sale of physician services in Washington. The identification of average reimbursement paid by individual insurers, as opposed to more aggregated data, could more readily lead to physician boycotts of the insurer(s) offering the lowest reimbursement rates. Another concern is that the dissemination of the average reimbursement paid by an insurer could, explicitly or implicitly, serve to facilitate an agreement among physicians on a starting point for negotiations with insurers.

To allay our concerns about potential anticompetitive effects, you have stated your belief that procompetitive benefits outweigh any potential anticompetitive concerns and have represented your intention to actively take steps to prevent use of the survey for anticompetitive actions. You believe that publication of average reimbursement information paid by an individual insurer likely will be procompetitive because it will allow a better and less costly comparison of the insurers' fee schedules. You have told us that providers in Washington often do not receive fee schedules from insurers and do not know what they will receive as reimbursement for particular procedures from particular providers. Therefore, this information will give physicians better information to utilize in making contracting decisions. Further, this information likely will be available not just to WSMA-member physicians but to other parties, such as insurers, employers, and academic researchers, and therefore will allow each of them to take better informed actions.

You also represent that the physician marketplace in Washington is relatively unconcentrated.[2] Furthermore, as your survey proposal anticipates, the data submitted by providers on insurer reimbursement will be at least three months old at the time that the Survey results are published. No provider-specific information will be disseminated, as there will be at least five providers reporting data upon which each disseminated statistic is based, and no individual provider's data will represent more than twenty-five percent on a weighted basis of that statistic. Only the average reimbursement data for each service will be provided for each Health Insurer. All of these factors, you maintain, make it unlikely that providers or insurers can use the information anticompetitively. In addition, it likely will be difficult for providers to monitor an agreement with respect to the reimbursement accepted from insurers because the one-year period between Surveys creates a lag before cheating on such an agreement would be discovered. Finally, it is also probable that providers would find it difficult to monitor such an agreement because the same service can sometimes be categorized by different CPT codes (or by a different combination of CPT codes).[3]

---

[2] We note that we would not ordinarily evaluate health care services on a statewide basis and would likely look to more local geographic areas and specialty physician services in any market evaluation.

[3] A survey that involves the dissemination of insurer-specific reimbursement information also could lead to collusive activities in the market for the purchase of physician services by health insurers. For example, the identification of average reimbursement information paid by individual insurers could provide a focal point for agreement on the fee schedule for reimbursement of physicians and enable insurers to monitor adherence to the agreement. Generally, however, we would expect providers not to participate (or continue participating) in a survey that enabled collusive insurer behavior to the disadvantage of providers. There are some situations, however, in which an analysis of insurer behavior would be relevant to our review (e.g., if the facts suggested that the information exchange was being used by one group of providers to disadvantage another group of providers with respect to insurer reimbursement). While there is no suggestion, based on what you have represented, that this is such a situation, we believe it might be useful to you to know some of the factors that would heighten our concern if we were to conduct such an analysis.

Our concern would be heightened if the health insurance market were susceptible to the exercise of market power through tacit coordination. For example, our concern would be greater if the market were concentrated or if there were no obstacles--such as different insurer business models or the payment by insurers of different amounts to different physicians or practices--that might impede insurers from reaching and monitoring agreement. Our concern would also be heightened if the information disseminated was of a type that facilitated the reaching or monitoring of an agreement. Thus, the more current or more specific the information disseminated, the greater the potential concern. Finally, our concern would increase if the information exchange were conducted frequently, as that would increase the ability of those colluding to detect cheating on the agreement.

In addition to presenting mitigating factors, the WSMA has represented that it will work to prevent physicians from utilizing the Survey to engage in boycotts or collusive pricing, by controlling WSMA staff, educating physician members, and issuing instructions about how Survey data may permissibly be used under the antitrust laws.

Based on your factual representations and intentions regarding the Survey, and recognizing that our concerns may be balanced against procompetitive benefits and safeguards, we conclude that we currently would not challenge the WSMA's proposal based upon the second portion of the survey. In this instance, your efforts to ensure proper collection of the raw data and proper use of the Survey results, coupled with the factors discussed above that make it unlikely that the Survey results could be used effectively for anticompetitive ends, provide us with sufficient comfort. In certain circumstances, however, the anticompetitive concerns identified with respect to this portion of the Survey could be significant enough for the Division to challenge such an information exchange. Thus, should circumstances change (e.g., if the Survey were being used to effect a group boycott or other collusive arrangement) or should certain significant WSMA representations on which we relied be inaccurate (e.g., if the Survey data were not aggregated as you have represented), we might reach the opposite conclusion.

The first portion of the Survey (Average Charge for Each Service) falls within the Safety Zone. In addition, as discussed above, we have no current intention of challenging the WSMA's proposal based on the second portion of the Survey (Average Reimbursement for Each Service, Aggregated by Health Insurer Named by Survey Respondents). As a result, we have no current intention of challenging the Survey based on the information that we have at this time.

This letter expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future if the actual operation of any aspect of the proposed information exchange proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Charles A. James